

the requirements of eight of the 14 checklist items – namely, Checklist Items 3, 5, 6, 8, 9, 10, 12, and 14.

Building on that report, SWBT filed the Arkansas 271 Agreement (“A2A”) (App. B – AR) with the Arkansas PSC on July 24, 2000. The A2A provides binding terms for interconnection, access to unbundled network elements (including the combination of UNEs not currently combined in SWBT’s network), and resale. Allis AR Aff. ¶ 10. On December 21, 2000, the Arkansas PSC issued another consultation report, in which it concluded that SWBT had satisfied Checklist Items 7, 11, and 13, identifying Checklist Items 1, 2, and 4 as the only ones for which additional proof was necessary. See App. C – AR, Tab 78 (“2000 Consultation Report”). The Arkansas PSC also found in the 2000 Consultation Report that SWBT still had to prove that it satisfied “Track A,” see 47 U.S.C. § 271(c)(1)(A).

In response to the 2000 Consultation Report, Southwestern Bell submitted a revised A2A that incorporated the rates that this Commission had recently approved in Kansas as part of the Kansas/Oklahoma Order. See Allis AR Aff. ¶¶ 11-12. Relying on evidence that the costs in Arkansas are equal to or higher than the costs in Kansas, Southwestern Bell demonstrated that it was, therefore, reasonable to incorporate Kansas rates into the A2A.

After further briefing and a hearing in April 2001, the Arkansas PSC issued its final consultation report on May 21, 2001, concluding that, if certain amendments were made, the A2A “will satisfy the fourteen point checklist contained in 47 U.S.C. § 271 when it is made available to CLECs.” App. C – AR, Tab 86, at 12 (“2001 Consultation Report”). After SBWT made these final adjustments, the Arkansas PSC formally approved the A2A on June 18, 2001.<sup>5</sup>

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<sup>5</sup> See Order No. 17, Application of Southwestern Bell Telephone Company to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996

By its terms, the A2A became effective for 18 months following the Arkansas PSC's determination that the A2A satisfies the 14-point competitive checklist; upon this Commission's timely approval of this Application, the terms of the A2A will be extended for an additional 30 months. See Allis AR Aff. ¶ 23; Sparks AR Aff. ¶ 9 (App. A – AR, Tab 22). The A2A, together with prior Commission approval of SWBT's OSS, performance measures and performance remedy plans, and Arkansas-specific performance results, provide ample assurance that the local market in Arkansas is, and will remain, fully open to competition. See generally Allis AR Aff.; Dysart AR Aff. (App. A – AR, Tab 7).

## **II. THE MISSOURI PROCEEDINGS**

Since before the passage of the 1996 Act, the Missouri PSC has taken substantial steps to ensure that local telecommunications exchange markets in Missouri are open to competition. See Hughes MO Aff. ¶¶ 6-8 (App. A – MO, Tab 11). After 1996, the process began in earnest with an arbitration proceeding including SWBT, AT&T, and MCI (now WorldCom) in Case Nos. TO-97-40, et al., where the Missouri PSC determined the terms and conditions for resale, interconnection, and certain unbundled network elements. This proceeding also established rates based on the Commission's TELRIC principles for many of the services offered by SWBT to CLECs. The Missouri PSC undertook an additional review of SWBT's costs in a second arbitration proceeding involving SWBT and AT&T in Case No. TO-98-115. Id. ¶ 11. The Missouri PSC has also conducted arbitration proceedings in which it established rates, terms, and conditions for the provision of digital subscriber line ("DSL") services. Id. ¶ 12.

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and for Approval of the Arkansas Interconnection Agreement, Docket No. 00-211-U (Ark. Pub. Serv. Comm'n June 18, 2001) (App. C – AR, Tab 89).

On September 25, 1997, the Missouri PSC issued an order requiring SWBT to give the Missouri PSC four months' notice before SWBT intended to file an application for relief under section 271 with this Commission. On November 20, 1998, SWBT filed its application with the Missouri PSC to provide in-region, interLATA services originating in Missouri pursuant to section 271 of the 1996 Act.<sup>6</sup>

In response to SWBT's filing, the Missouri PSC conducted an extensive evidentiary hearing between March 1 and March 10, 1999. Many parties, including Missouri CLECs, the Missouri PSC Staff, the Office of Public Counsel, and the Attorney General of the State of Missouri, participated actively in these hearings. See Hughes MO Aff. ¶ 14. Simultaneously, the Texas Commission was engaged in its own lengthy and rigorous collaborative process, including a thorough review of SWBT's policies, practices, and procedures for opening its local markets to competition; a comprehensive, third-party test of SWBT's region-wide OSS conducted by Telcordia Technologies, Inc.; the adoption of performance measures developed through the collaborative process; and implementation of a performance remedy plan with strong financial incentives to prevent "backsliding." See id. ¶ 15.

In June 2000, SWBT filed a motion requesting that it be allowed to update the record and that the Missouri PSC approve its proposed Missouri Interconnection Agreement ("M2A") (App. B – MO). The M2A is modeled on the Texas 271 Agreement ("T2A"), which had been reviewed and approved by the Texas Commission and which has since been approved by this Commission in the Texas Order. The M2A generally followed the substantive terms of the T2A,

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<sup>6</sup> See Notice of Filing of Interim Consultant Report and Motion for Setting of Procedural Dates, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Oct. 12, 2000) (App. C – MO, Tab 64).

while also incorporating the Missouri PSC's arbitration decisions and various other modifications. The M2A provided terms for interconnection, access to unbundled network elements ("UNEs") (including combinations of UNEs not currently combined in SWBT's network), and resale. By its terms, the M2A will be effective for one year after the Missouri PSC's finding that it complies with the requirements of section 271. If this Commission were to approve this Application, the terms of the M2A would be extended for an additional three years.

The Missouri PSC built on all of the work completed by the Texas Commission by initiating its own proceeding in which Ernst & Young was engaged to evaluate SWBT's data collection processes for performance measures as well as to verify that the Telcordia OSS Test was a sufficient basis on which to conclude that SWBT could successfully process the anticipated commercial volume of CLEC orders in Missouri. Ernst & Young's evaluation confirmed that SWBT could handle the anticipated commercial volume in Missouri and validated SWBT's data collection processes. See Hughes MO Aff. ¶¶ 17-18.

In October 2000, the Missouri PSC conducted open hearings on SWBT's application. These hearings resembled a collaborative process during which the Commissioners engaged in a question-and-answer session with the parties over two days. All interested parties then filed two rounds of briefing concerning SWBT's compliance with the 14-point checklist. Id. ¶¶ 20-21. Additional hearings took place in November 2000, and the Missouri PSC once again permitted all parties to participate and to raise any issue relating to SWBT's compliance with its statutory and regulatory obligations. During these hearings, Ernst & Young described in detail the review it had conducted of SWBT's data collection and OSS processes. The Missouri PSC ordered its Staff to conduct a technical conference with Ernst & Young and interested parties to respond to any additional questions that CLECs had about Ernst & Young's review. That conference was

conducted at the end of January 2001. See id. ¶¶ 22-24. The Missouri PSC conducted an additional hearing on January 31, 2001, affording CLECs a final opportunity to raise any remaining issues and allowing the Missouri PSC to seek clarification on the parties' positions. Id. ¶ 25.

On February 13, 2001, the Missouri PSC issued its Interim Order.<sup>7</sup> The Missouri PSC identified specific areas in which it concluded that the version of the M2A before it did not satisfy the competitive checklist. Interim Order at 3-9. SWBT submitted final revisions to the M2A on February 28, 2001.

After first issuing its Compliance Order,<sup>8</sup> the Missouri PSC issued its 92-page Final Missouri PSC Order<sup>9</sup> on March 15, 2001, comprehensively analyzing SWBT's compliance with the competitive checklist. The Missouri PSC concluded that, "[b]ased on the extensive record in this case, the availability of the M2A to Missouri CLECs, and the Commission's intention to expeditiously determine permanent rates, terms, and conditions for collocation, line sharing, line

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<sup>7</sup> See Interim Order Regarding the Missouri Interconnection Agreement, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Feb. 13, 2001) (App. C – MO, Tab 86).

<sup>8</sup> See Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Mar. 6, 2001) (App. C – MO, Tab 96).

<sup>9</sup> Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Mar. 15, 2001) (App. C – MO, Tab 98).

splitting, loop conditioning, and unbundled network elements,” SWBT has met the statutory requirements for relief under section 271. Final Missouri PSC Order at 91. The Missouri PSC “recommends that the FCC grant SWBT’s Application for authorization to provide in-region, interLATA services in the state of Missouri.” Id.

## DISCUSSION

### I. SOUTHWESTERN BELL IS ELIGIBLE TO SEEK INTERLATA RELIEF UNDER SECTION 271(c)(1)(A)

SWBT satisfies Track A in both Arkansas and Missouri: competitors are providing services to both residential and business subscribers, either exclusively or predominantly over their own facilities. See 47 U.S.C. § 271(c)(1)(A).

#### A. Arkansas

Local competition has taken root in Arkansas. CLECs serve at least 8.6 percent, and probably closer to 10.3 percent, of the access lines in SWBT’s serving area. See J.G. Smith AR Aff. ¶ 5 & Table 2 (App. A – AR, Tab 21). On a proportional basis, moreover, CLECs in Arkansas serve more residential customers than were served in Kansas at the time of SBC’s section 271 application there, see id. ¶ 6, a comparison that this Commission found compelling in its review of Verizon’s “Track A” showing in Connecticut. See Connecticut Order<sup>10</sup> ¶¶ 70-71.

As with other states in which section 271 relief has been sought, local competition in Arkansas is increasing.<sup>11</sup> In the last year, for example, CLEC UNE platform orders have

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<sup>10</sup> Memorandum Opinion and Order, Application of Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001).

<sup>11</sup> See Press Release accompanying Industry Analysis Div., FCC, Local Telephone Competition: Status as of December 31, 2000 (May 2001) (noting that states with long-distance relief show by far the “[g]reatest [c]ompetitive [a]ctivity”).

ballooned more than 2,700 percent, UNE loops grew by 64 percent, interconnection trunks by 65 percent, and E911 listings by 26 percent. See J.G. Smith AR Aff. ¶ 8 & Attach. D. Indeed, the only significant indicator that has declined in the last year is resold business lines, which have declined as competitors have moved towards reliance on UNEs and on their own facilities. Id. Attach. D; see Local Competition Order,<sup>12</sup> 11 FCC Rcd at 15668, ¶ 334 (explaining that CLECs will opt for UNE-based entry over resale in markets with “sufficient demand to recoup their investment”).

To be eligible for section 271 relief under “Track A,” a BOC must establish that it has one or more approved interconnection agreements pursuant to which it “is providing access and interconnection . . . [to] unaffiliated competing providers of [exclusively or predominantly facilities-based] telephone exchange service . . . to residential and business subscribers.” 47 U.S.C. § 271(c)(1)(A). As the Affidavit of J. Gary Smith explains, SWBT’s agreements with ALLTEL and Navigator satisfy this requirement. See J.G. Smith AR Aff. Table 1 & Attach. E ¶¶ 3-8.<sup>13</sup> ALLTEL and Navigator both operate pursuant to Arkansas PSC-approved agreements, and both provide facilities-based service to business and residential customers in the state. Id.;

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<sup>12</sup> First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff’d in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), cert. granted in part sub nom. Verizon Communications Inc. v. FCC, 121 S. Ct. 877-79 (2001).

<sup>13</sup> SWBT has more than 100 approved interconnection and/or resale agreements with CLECs in Arkansas. See J.G. Smith AR Aff. ¶ 4. These agreements are listed in J.G. Smith AR Aff. Attach. B. A selection of the most significant Arkansas interconnection agreements are reproduced in Appendix B – AR. The status of federal court challenges to SWBT’s agreements in Arkansas is provided in Attachment 4 to this Brief.

see also Michigan Order,<sup>14</sup> 12 FCC Rcd at 20598, ¶ 101 (service provided through UNEs is facilities-based for purposes of Track A).

It is of no significance that, at this point in time, ALLTEL is not actively marketing its wireline voice services to one segment of its customer base – residential customers. See Arkansas PSC Tr. (11/2/2000) at 19 (App. C – AR, Tab 69) (ALLTEL announcing, on the first day of SWBT’s section 271 hearing before the Arkansas PSC, that it has “discontinued its offering of residential CLEC service in this market”). Congress did not enact Track A in order to subject section 271 entry to the marketing whims of individual CLECs. Rather, Track A is intended simply to verify the existence of one or more interconnection agreements pursuant to which facilities-based competition is possible. As Congress explained:

The requirement of an operational competitor is crucial because . . . whatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the “agreement” and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout a State, with an absolute minimum of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the “openness and accessibility” requirements have been met.

H.R. Rep. No. 104-204, pt. 1, at 77 (1995). ALLTEL is currently operating under an interconnection agreement pursuant to which it serves both business and residential customers, and CLECs throughout the state may opt into this agreement, just as they can with any Arkansas PSC-approved interconnection agreement. See 47 U.S.C. § 252(i). Nothing more is necessary to satisfy Track A.

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<sup>14</sup> Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, To Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543 (1997).



At the latest hearing on SWBT's section 271 application in April 2001, Navigator announced that it "will not provision any further service to its local telephone customers in Arkansas on a UNEP basis." Arkansas PSC Tr. (4/20/01) at 44 (App. C – AR, Tab 82). However, at that hearing, Navigator's representative also indicated that, although Navigator has made the business decision to stop converting its resale customers to the UNE platform, it had no intention of abandoning the residential market altogether. On the contrary, "Navigator remains committed to providing local service to its business and residential customers on a resale basis." Id. at 44-45.

Commission precedent confirms that ALLTEL and Navigator qualify as Track A carriers, notwithstanding their business decision to cease marketing their facilities-based services at this time to residential customers. As the Commission has made clear, and as the legislative history of the 1996 Act confirms, if a carrier is in the market and operational, and if its service is being used as a replacement for the BOC's service, that carrier counts for purposes of Track A.<sup>15</sup> ALLTEL and Navigator clearly satisfy this test, and it is therefore immaterial that they have

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<sup>15</sup> See Memorandum Opinion and Order, Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, 20623, ¶ 31 (1998) ("Second Louisiana Order") (a carrier's service qualifies for purposes of Track A if it "is being used" as a replacement for the BOC's service); Memorandum Opinion and Order, Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, 12 FCC Rcd 8685, 8695, ¶ 14 (1997) (The language of Track A "suggests that there must be an actual commercial alternative to the BOC . . . . Consistent with this interpretation, [the legislative history indicates that Track A requires that] 'the competitor has implemented the agreement and the competitor is operational.'" (quoting H.R. Rep. No. 104-458, at 148 (1996)); id. at 8696-97, ¶ 17 ("for the purposes of [Track A], the competing provider must actually be in the market, and, therefore, beyond the testing phase"); see also AT&T's Response to ATG, Pac-West, and WorldCom's Motion to Dismiss at 1, Petition for Review and Approval of the Draft Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Nevada, Docket No. 00-7031 (Nev. Pub. Utils. Comm'n filed Oct. 13, 2000) (a carrier qualifies for purposes of Track A if it "provide[s] service" to residential and business subscribers).

made business decisions to cease marketing facilities-based wireline services to one segment of customers. Nothing would prevent them from reaching a different business decision tomorrow and begin marketing to residential consumers once again.

Moreover, even if the Commission were to somehow read into the statute an implicit marketing requirement – and decide not to consider ALLTEL’s and Navigator’s residential service – SWBT would still satisfy Track A in Arkansas. First, several additional carriers provide facilities-based service to both business and residential customers in Arkansas. See J.G. Smith AR Aff. Table 1 & Attach. E, ¶¶ 9-16 (discussing Logix, McLeod, and WorldCom). To be sure, these carriers do not serve nearly as many residential lines as ALLTEL or Navigator, but there is no statutory requirement that a qualifying CLEC under section 271(c)(1)(A) serve any particular quantity of customers. See Michigan Order, 12 FCC Rcd at 20584-85, ¶¶ 76-77. To the contrary, Congress rejected metric tests of actual competition in favor of a clear statutory “test of when markets are open.” 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler).

Second, and in any event, the Commission has squarely held that, for purposes of Track A, a BOC can rely on multiple carriers and that, when it does so, “each such carrier need not provide service to both residential and business customers.” Michigan Order, 12 FCC Rcd at 20587-88, ¶ 82. The Commission has further explained that, “if all other requirements of section 271 have been satisfied,” a BOC may rely for purposes of Track A on “the existence of competitors’ service to residential customers through resale.” Kansas/Oklahoma Order ¶ 43 n.101 (quoting Second Louisiana Order, 13 FCC Rcd at 20635, ¶ 48). Any number of CLECs provide resold service to thousands of Arkansas residential customers. See J.G. Smith AR Aff. Attach. C at 3. Considered in combination with the many carriers that provide facilities-based

service to the business market, these carriers further establish that SWBT satisfies Track A in Arkansas.

**B. Missouri**

Local competition is thriving in Missouri. CLECs now serve between 10.2 and 15.3 percent of the access lines in the state. See Tebeau MO Aff. ¶ 5 & Table 2 (App. A – MO, Tab 24) ; see also Final Missouri PSC Order at 20 (finding “that CLECs serve approximately 12 percent of access lines in SWBT territory”).<sup>16</sup> Spurred on by SWBT’s application for 271 relief, moreover, CLECs are substantially increasing their competitive activity. Between June 2000 and June 2001, for example, CLECs’ E911 listings grew almost 111 percent, UNE loop/port combinations grew 146 percent while stand-alone loops grew 184 percent, and operational physical collocation arrangements were up more than 70 percent. See Tebeau MO Aff. ¶ 8 & Attach. D. These numbers make clear that CLECs are taking full advantage of the meaningful opportunity to compete that SWBT provides in Missouri.

SWBT has 112 approved interconnection and/or resale agreements with CLECs in Missouri. See id. ¶ 4.<sup>17</sup> Pursuant to these agreements, many CLECs are providing facilities-based service to business and residential customers. See generally id. Attachs. B, C, E. These

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<sup>16</sup> This finding was based on information that the CLECs themselves provided to the Missouri PSC Staff. See Staff’s Response Comments to October Question and Answer Session, and to Interim Consultant Report at 7 & App. A ¶ 17, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm’n Oct. 26, 2000) (App. C – MO, Tab 67).

<sup>17</sup> These agreements are listed in Tebeau MO Aff. Attach. B. A selection of the most significant Missouri interconnection agreements have been reproduced in Appendix B – MO. The status of federal court challenges to SWBT’s agreements in Missouri is provided in Attachment 3 to this Brief.

Track A carriers include AT&T, which has several operational voice switches in Missouri, operates under an approved interconnection agreement, and provides facilities-based service via its cable television facilities to many thousands of residential and business subscribers. See id. Attach. E ¶¶ 1, 3-5. Likewise, WorldCom offers service almost exclusively over its own facilities to business and residential customers. See id. Attach. E ¶¶ 6-8. Ionix, too, provides UNE-platform service to business and residential customers, thereby qualifying as a Track A carrier as well. Id. Attach. E ¶¶ 21-23.

As in Arkansas, moreover, additional CLECs collectively qualify as Track A providers under the standards developed in prior Commission decisions.<sup>18</sup> As the Affidavit of David R. Tebeau shows, these qualifying carriers include, for example, Birch and Global Crossing/Frontier, each of which provides predominantly facilities-based service to business customers in Missouri, considered in combination with the multitude of carriers that provide service to the residential market. See Tebeau MO Aff. Attach. E ¶¶ 12-17; id. Attach. B.

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<sup>18</sup> See Kansas/Oklahoma Order ¶ 43 n.101; Second Louisiana Order, 13 FCC Rcd at 20635, ¶ 48; Michigan Order, 12 FCC Rcd at 20587-88, ¶ 82.

## II. SOUTHWESTERN BELL'S PRICES FOR UNBUNDLED NETWORK ELEMENTS IN BOTH ARKANSAS AND MISSOURI ARE CONSISTENT WITH THE COMMISSION'S COST METHODOLOGY

Southwestern Bell's rates for unbundled network elements in both Arkansas and Missouri are consistent with this Commission's TELRIC methodology. This Commission has made clear that it does not review rates de novo in a section 271 proceeding. See Massachusetts Order<sup>19</sup> ¶ 20; see also AT&T Corp. v. FCC, 220 F.3d 607, 615 (D.C. Cir. 2000) (noting that "[t]he FCC does not conduct de novo review of state pricing determinations in section 271 proceedings, nor does it adjust rates to conform with TELRIC").<sup>20</sup> Rather, the Commission's role is to determine only whether the state's rates comply with basic TELRIC principles:

In reviewing state pricing decisions in the context of section 271 applications, we will not reject an application because isolated factual findings by a commission might be different from what we might have found if we were arbitrating the matter under section 252(e)(5). Rather, we will reject the application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.

New York Order, 15 FCC Rcd at 4084, ¶ 244; see also Massachusetts Order ¶ 20; Kansas/Oklahoma Order ¶ 59.

Admittedly, the UNE rates in some states are higher than in others, but that is hardly surprising. Not only are there significant cost differences that can account for differences in rates, see B. Smith MO Aff. ¶¶ 141-144, but, as the D.C. Circuit explained, "TELRIC is not a specific formula, but a framework of principles that govern pricing determinations." AT&T Corp., 220 F.3d at 615. "[W]hile TELRIC consists of 'methodological principles' for setting

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<sup>19</sup> Memorandum Opinion and Order, Application of Verizon New England Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, FCC 01-130 (rel. Apr. 16, 2001).

<sup>20</sup> See also Kansas/Oklahoma Order ¶ 59; New York Order, 15 FCC Rcd at 4084, ¶ 244.

prices, states retain flexibility to consider ‘local technological, environmental, regulatory, and economic conditions.’” New York Order, 15 FCC Rcd at 4084, ¶ 244 (quoting Local Competition Order, 11 FCC Rcd at 15559, ¶ 114, 15812, ¶ 618) (footnote omitted). This Commission will not ordinarily conduct a state-to-state comparison of rates because it has recognized that rates will “vary[] . . . from one state to the next.” Michigan Order, 12 FCC Rcd at 20699, ¶ 291. And the D.C. Circuit acknowledged that, “while state commissions use TELRIC to establish rates, application of TELRIC principles may result in different rates in different states.” AT&T Corp., 220 F.3d at 615.

TELRIC is a methodology, not a result. The variation among the rates in Arkansas, Missouri, Kansas, Oklahoma, and Texas is not only reasonable, but it is to be expected under the pricing regime enacted by Congress in the 1996 Act and by the Commission’s pricing methodology. The Commission itself recognized variation from state-to-state in its Local Competition Order when it established default proxies for particular network elements. 11 FCC Rcd at 15894, ¶ 792; 47 C.F.R. § 51.513(c).

#### **A. Arkansas**

In its 2001 Consultation Report, the Arkansas PSC summarized its view that certain provisions of Arkansas state law restrict its ability to establish rates under the scheme established by the 1996 Act:

[T]his Commission has not decided to refuse to hear arbitration proceedings. Indeed, there are arbitration proceedings currently pending before this Commission; however, in establishing UNE rates, the Commission is bound by Ark. Code Ann. § 23-17-409(e) (Supp. 1999) which requires that “[t]he prices for unbundled network elements shall include the actual costs including an allocation of joint and common costs and reasonable profit.” This Commission is also prohibited from imposing any interconnection requirements that go beyond the requirements of the federal act or regulations promulgated under the federal act. (Ark. Code Ann. § 23-17-408(i)(2) (Supp. 1999)). Except for basic local exchange service and switched-access service, any company making an election

under Ark. Code Ann. § 23-17-406, such as SWBT, may increase or decrease its rates for telecommunications services without Commission approval. (Ark. Code Ann. § 23-17-408(c) (Supp. 1999)).

2001 Consultation Report at 11.

SWBT consistently argued to the Arkansas PSC that the state commission had ample authority under both state and federal law to review the rates contained in the A2A and to approve the A2A as part of its consultative role under section 271(d)(2)(B). See, e.g., Brief of Southwestern Bell Telephone Company Regarding This Commission's Authority to Approve the A2A, Docket No. 00-211-U (Ark. Pub. Serv. Comm'n filed Nov. 1, 2000) (App. C – AR, Tab 67); Southwestern Bell Telephone Company's Findings of Fact and Conclusions of Law, Docket No. 00-211-U (Ark. Pub. Serv. Comm'n filed Nov. 13, 2000) ("SWBT's Findings of Fact and Conclusions of Law") (App. C – AR, Tab 72). Specifically, SWBT insisted that nothing under Arkansas state law – and, in particular, nothing in Act 77, Ark. Code Ann. §§ 23-17-401 et seq. – precludes the Arkansas PSC from reviewing the terms, conditions, and rates governing SWBT's provision of interconnection, resale, and UNEs in Arkansas. Because the Arkansas PSC's review would constitute a proceeding under federal law, the Arkansas PSC retained the necessary authority to ensure that any outstanding issues, including pricing, were resolved in a manner that satisfied the requirements of the federal Act and any applicable FCC regulations. In SWBT's view, the Arkansas PSC also retained full authority to review cost data and to conduct cost proceedings in order to carry out its responsibilities under federal law. SWBT also disagreed with the Arkansas PSC's conclusions that a state law limitation on its authority with respect to retail rates (Ark. Code Ann. § 23-17-408(c)) somehow limited its authority over rates that SWBT could charge for resale, unbundled network elements, and interconnection under federal law. See SWBT's Findings of Fact and Conclusions of Law at 4.

Nevertheless, in light of the Arkansas PSC's conclusions concerning the scope of its authority under state law, SWBT proposed to replace the UNE rates contained in the A2A with the cost-based prices contained in the Kansas 271 Agreement ("K2A") – rates that had been reviewed and approved by this Commission in the Kansas/Oklahoma Order. See Southwestern Bell Telephone Company's Response to the Commission's Consultation Report, Docket No. 00-211-U (Ark. Pub. Serv. Comm'n filed Mar. 23, 2001) (App. C – AR, Tab 79). In its Kansas/Oklahoma Order, this Commission suggested for the first time that a state might be "entitled to a presumption of compliance with TELRIC" if it adopted approved rates in whole and could demonstrate that its costs were at or above the costs in that state whose rates it adopted. Kansas/Oklahoma Order ¶ 82 n.244 (referring expressly to the adoption of New York or Texas rates).

In the Massachusetts Order, this Commission extended the presumption to allow Verizon voluntarily to adopt UNE rates in Massachusetts that were equivalent to the rates that had already been approved in New York. See Massachusetts Order ¶¶ 21-42. Because the evidence demonstrated that the costs of switching and loops in Massachusetts were either the same as or higher than the costs of those elements in New York, Verizon's rates in Massachusetts were within the range that a reasonable application of TELRIC principles would produce.

In reasoning that New York was a "permissible state for UNE rate comparison purposes," the Commission applied the standard that had first been developed when comparing Oklahoma and Texas loop rates. Id. ¶ 28. A comparison between states is permissible because "1) they have a common BOC and geographic similarities; 2) they have similar, although not identical, rate structures for comparison purposes; and 3) the Commission had already found the rates in Texas to be reasonable." Id. (concluding that Verizon may rely on New York rates in



Massachusetts because “[t]he states are adjoining, they have similar rate structures, the Commission has found the New York rates are within a zone that is consistent with TELRIC based on current information in the record, and it is the same BOC in both states”).

The Arkansas PSC applied this same analysis when concluding that it was appropriate to use Kansas rates in Arkansas:

SWBT has mirrored Kansas UNE prices in the modified A2A. The record clearly reveals that costs in Arkansas are equal to or above Kansas costs. (T. 2337, 2391). The proposed UNE rates have also been approved by the FCC as being in compliance with the TELRIC methodology for use in the K2A. In addition, Arkansas and Kansas are geographically similar, have a common BOC and similar rate structures. Therefore, the Commission concludes that the UNE prices in the proposed A2A are within the parameters of the TELRIC methodology as applied.

2001 Consultation Report at 8.

Finally, in order to remove any doubt regarding the appropriateness of adopting the Kansas rates in Arkansas, SWBT has voluntarily agreed to adjust its geographic zone definitions in Arkansas to match more closely the Kansas zone definitions. See Allis AR Aff. ¶ 33. As this Commission recognized in the Massachusetts Order, rate structures need to be “similar, although not identical” (¶ 28) whenever one state seeks to adopt the rates of another, and the revised zone definitions in Arkansas clearly satisfy this requirement.

### **1. Recurring Rates**

In 1999, the Kansas Corporation Commission (“KCC”) established recurring rates for UNEs that SWBT incorporated into the UNE pricing appendix of the K2A. In reviewing these rates as part of the Kansas/Oklahoma section 271 proceeding, this Commission concluded “that Kansas’ recurring UNE rates fall within the reasonable range of TELRIC prices. Furthermore, the Kansas Commission’s orders show a consistent application of TELRIC principles in the setting of recurring prices. Because no commenter presents evidence of clear errors in

substantial factual matters, and the KCC followed TELRIC principles, we conclude that these prices comply with our rules.” Kansas/Oklahoma Order ¶ 55 (footnote omitted).

It is not enough that the Kansas recurring rates are TELRIC-based; as this Commission has made clear, to benefit from the “presumption of compliance with TELRIC” that would flow from incorporating Kansas recurring rates into the A2A, SWBT must also demonstrate that its costs in Arkansas are at or above the costs in Kansas. Id. ¶ 82 n.244; Massachusetts Order ¶ 22. In the Kansas/Oklahoma Order, this Commission concluded that its “[Universal Service Fund or “USF”] cost model provides a reasonable basis for comparing cost differences between states. We have previously noted that while the USF cost model should not be relied upon to set rates for UNEs, it accurately reflects the relative cost differences among states.” Kansas/Oklahoma Order ¶ 84.

Based on an analysis of the five cost categories comprising the UNE Platform – the loop, line port, end office usage, signaling, and transport facility categories – Southwestern Bell has concluded that “the overall cost of providing service in Arkansas, as derived from the FCC’s USF Model, is 15% higher than the comparable Kansas costs. With respect to the Loop, Line Port, Signaling and Transport facility categories, the USF Model costs for Arkansas are higher than the USF Model costs in Kansas. The Arkansas and Kansas USF Model costs for the End Office Usage category are almost identical.” Makarewicz AR Aff. ¶ 9 (App. A – AR, Tab 15); see also id. ¶ 8 & Table 1; id. Attach. A.

No carrier disputed these conclusions before the Arkansas PSC. See 2001 Consultation Report at 3. Indeed, AT&T’s witness in the initial Missouri proceeding conceded that, at least

with respect to loops, the costs in Arkansas are higher than in Kansas.<sup>21</sup> The recurring rates currently in place in Arkansas are therefore consistent with the requirements of section 252(d)(2) and TELRIC.

As Edward K. Allis explains in his affidavit, some of the rates that the A2A has “borrowed” from the K2A are interim. See Allis AR Aff. ¶ 48. When the KCC sets final rates for those UNEs, SWBT will file a revised price schedule or appendix with the Arkansas PSC reflecting the final prices.<sup>22</sup> The prices will be incorporated into the agreements with CLECs that opted into the approved A2A, and, where appropriate, SWBT will provide a retroactive true-up. See Allis AR Aff. ¶ 48.

## **2. Nonrecurring Rates**

In the Kansas/Oklahoma Order, this Commission concluded that SWBT’s nonrecurring rates were established consistent with TELRIC principles and that the KCC had appropriately exercised its flexibility to set prices within a range of TELRIC-based rates. Kansas/Oklahoma Order ¶ 60. Although certain of the Kansas nonrecurring rates were higher than comparable rates in Texas, the fact that SWBT had voluntarily reduced most of its Kansas nonrecurring rates “eliminate[d] any remaining concerns about whether Kansas’ nonrecurring rates are within the range of what a reasonable application of TELRIC principles would produce.” Id.

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<sup>21</sup> See Declaration of Michael Lieberman on Behalf of AT&T Corp. ¶¶ 22-23 & Tables 2, 3 (Exh. A to Comments of AT&T Corp., CC Docket No. 01-88 (FCC filed Apr. 24, 2001)).

<sup>22</sup> For example, on August 2, 2001, SWBT modified the rates in the Appendix Pricing UNE (A2A) Schedule of Prices to reflect the fact that the KCC had recently established permanent monthly rates for certain dedicated transport elements. See Letter from H. Edward Skinner, SWBT, to Diana Wilson, Arkansas PSC (Aug. 2, 2001), attaching revised Appendix Pricing UNE (A2A) Schedule of Prices (App. C – AR, Tab 91).

SWBT modified the nonrecurring rates offered in the A2A to incorporate the Kansas nonrecurring charges (as voluntarily reduced and ultimately approved by this Commission). As in the case of the recurring rates, SWBT also demonstrated to the Arkansas PSC that the nonrecurring costs in Arkansas were either equal to or greater than the nonrecurring costs in Kansas. SWBT developed a series of nonrecurring cost studies. See Lundy AR Aff. Attach. A. As Dale Lundy explains in his affidavit, the cost studies were developed using the TELRIC methodology approved by the KCC, and they demonstrate that the nonrecurring costs for UNEs in Arkansas are essentially equal to or greater than the comparable costs in Kansas. See id. ¶ 16 & Attach. A. It would, therefore, be consistent with TELRIC, as the Arkansas PSC concluded, to incorporate the Kansas nonrecurring rates into the A2A.

## **B. Missouri**

SWBT provides UNEs in Missouri in compliance with all Commission and statutory requirements. SWBT has developed rates that comply with the TELRIC methodology as previously articulated by this Commission. See Sparks MO Aff. ¶ 147 (App. A – MO, Tab 23). Accordingly, SWBT provides CLECs even lower rates than they would be eligible to receive under the 1996 Act, as interpreted by the Eighth Circuit. See Iowa Utils. Bd. v. FCC, 219 F.3d 744, 749-51 (8th Cir. 2000), cert. granted in part sub nom. Verizon Communications Inc. v. FCC, 121 S. Ct. 877-79 (2001).

### **1. Introduction**

The UNE prices contained in the M2A are derived from three sources: (1) the prices for the bulk of UNEs that are actually being ordered by CLECs throughout Southwestern Bell's region are permanent and derived from the rates established originally by the Missouri PSC as part of the first arbitration proceeding between SWBT and AT&T (Case No. TO-97-40) that

concluded in the First Arbitration Order<sup>23</sup> on July 31, 1997; (2) a number of additional UNE prices in the M2A are interim and based on the rates established in the second arbitration proceeding between SWBT and AT&T (Case No. TO-98-115) that concluded in the Second Arbitration Order<sup>24</sup> on December 23, 1997; and (3) finally, prices for those UNEs that have not yet been reviewed by the Missouri PSC have been set at the rates contained in the T2A, subject to true-up when the Missouri PSC sets permanent rates for those UNEs.<sup>25</sup>

The M2A offers the monthly recurring and nonrecurring charges that were established by the Missouri PSC in the First Arbitration Order with a 25-percent reduction in the nonrecurring charges (so long as those charges do not fall below the level established in the T2A). This 25-percent discount was offered as a voluntary reduction in nonrecurring charges similar to the one that SWBT offered as part of its application for section 271 relief in Kansas. See Kansas/Oklahoma Order ¶ 56; Staff Report<sup>26</sup> at 5. The UNE rates contained in the M2A are,

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<sup>23</sup> Final Arbitration Order, AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-97-40 (Mo. Pub. Serv. Comm'n July 31, 1997) (App. G – MO, Tab 11).

<sup>24</sup> Report and Order, AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-98-115 (Mo. Pub. Serv. Comm'n Dec. 23, 1997) (App. G – MO, Tab 20).

<sup>25</sup> There is one exception: the UNE rates for loop conditioning do not actually fall into any of these three categories. The loop-conditioning rates had been previously established by the Missouri PSC in connection with three separate arbitrations concerning the provision of xDSL services, see Hughes MO Aff. ¶ 12. Rather than accept the loop-conditioning rates that it had already established in these prior proceedings, the Missouri PSC ordered Southwestern Bell to include the loop-conditioning rates from the T2A on an interim basis, subject to true-up, and has opened Case No. TO-2001-439 to establish new rates for loop conditioning. Id. ¶ 33.

<sup>26</sup> Staff Report on Compliance with Commission Interim Order Regarding the Missouri Interconnection Agreement, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (Mo. Pub. Serv. Comm'n Feb. 23, 2001) (App. C – MO, Tab 93).

therefore, either equal to or lower than the corresponding rates established by the Missouri PSC in the First Arbitration Order. The Missouri Staff has concluded that these rates are “in conformance with the modifications suggested by the [Missouri PSC] in its February 13th interim order” and that “UNE prices established in Case No. TO-97-40 constitute the bulk of UNEs ordered by competitors in Missouri.” Staff Report at 5.

The M2A also offers, on an interim basis subject to true-up, all of the prices for UNEs and services that were ordered by the Missouri PSC in the Second Arbitration Order as part of Case No. TO-98-115. The Missouri PSC already has pending a proceeding – Case No. TO-2001-438 – in which it will establish permanent prices for these UNEs. These rates, like those from the First Arbitration Order, have also had their nonrecurring charges reduced by up to 25 percent (subject to the T2A “floor”).

Finally, the M2A contains “prices for 95 unbundled network elements identified by Staff that have not been reviewed by the [Missouri PSC] for conformance with the FCC’s standards.” Interim Order at 5. Relying on the fact that this Commission had already approved interim prices in Texas for these “95 UNEs”<sup>27</sup> – as well as on the fact that “CLECs and SWBT have been operating under the Texas agreement for a substantial period of time using those prices,” Interim Order at 6 – the Missouri PSC concluded that SWBT should offer the prices for these UNEs as contained in the T2A, subject to true-up with permanent rates. SWBT agreed to offer these interim rates and revised the M2A accordingly. The Missouri Staff concluded that “SWBT has complied with the [Missouri PSC’s] interim order by implementing T2A prices for these services/elements.” Staff Report at 6.

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<sup>27</sup> The true number of UNEs that fall into this category is 74, not 95. See M2A Attach. 6 – UNE.

## 2. First and Second Arbitration Orders

The rates established in the First Arbitration Order and in the Second Arbitration Order were the result of a detailed and comprehensive review by the Missouri PSC. After AT&T filed for arbitration in July 1996, the Missouri PSC invited the filing of written testimony and held formal hearings including cross-examination between October 8 and October 17, 1996. In December 1996, the Missouri PSC entered an order setting interim rates.<sup>28</sup> The federal district court that reviewed these arbitration proceedings explicitly recognized that “the PSC entered an order setting interim rates using the TELRIC methodology.” AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932, 941 (W.D. Mo. 1999) (emphasis added), rev’d in part and vacated in part on other grounds sub nom. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm’n, 236 F.3d 922 (8th Cir. 2001), petition for cert. pending, AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., No. 00-1689 (filed May 8, 2001). Indeed, SWBT moved for rehearing before the Missouri PSC on the grounds that the PSC should not have used TELRIC because the Eighth Circuit had stayed those regulations, but the Missouri PSC denied the motion.

In its effort to set permanent rates, the Missouri PSC ordered its Staff to undertake an extensive investigation of SWBT’s prices, meeting two or three days each week for four months with SWBT personnel in SWBT’s offices to ensure that software, data, and subject matter experts responsible for each critical input value would be readily available. See B. Smith MO Aff. ¶¶ 12-16. The Missouri Staff also met extensively with AT&T’s personnel, gathering

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<sup>28</sup> See Arbitration Order, AT&T Communication of the Southwest, Inc.’s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-97-40 (Mo. Pub. Serv. Comm’n Dec. 11, 1996) (App. G – MO, Tab 9).

similar information. See AT&T Communications, 86 F. Supp. 2d at 941 (describing the Missouri Staff's investigative procedure).

The Missouri Staff found that SWBT's cost studies fully complied with TELRIC principles. First Arbitration Order Attach. C – Costing and Pricing Report at 3 (“Costing and Pricing Report”) (“SWBT's TELRIC cost studies with modifications are Missouri specific and more closely calculate the forward-looking economic costs incurred in SWBT territory.”). In accordance with sections 251(c)(3) and 252(d)(1) of the Act and this Commission's TELRIC principles, SWBT's cost studies identified the entire quantity of the network elements provided. Only forward-looking, incremental costs were included. See B. Smith MO Aff. ¶¶ 19, 26-27. SWBT's studies calculated nonrecurring costs by identifying the work groups involved and the time required to complete each activity, identifying the labor costs for the personnel typically performing them, and multiplying the time required to perform these activities by the labor costs adjusted to represent the planning period of the cost study. Id. ¶ 32.

In July 1997, the Missouri PSC issued its First Arbitration Order adopting permanent rates. In doing so, the Missouri PSC attached a lengthy Costing and Pricing Report issued by the Staff and explained that it had based its ultimate pricing decisions only on the information contained in the Report: “The [Report] consumes several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration.” First Arbitration Order at 3; see id. Attach. C. The Missouri Staff explained in its Costing and Pricing Report the basis for the rates that were ultimately adopted by the Missouri PSC:

Staff believes the most appropriate cost standard is the use of forward-looking economic costs assuming the existing network were being rebuilt today to meet forward-looking levels of demand. The approach includes the use of the latest technology currently deployed in the existing network. This approach also



recognizes the use of existing rights-of-way and physical constraints that dictate how and where the network must be placed. Staff believes this costing standard will most closely resemble the costs that an efficient competitor would face if entering the market today. Finally, by recognizing forward-looking demand, this approach focuses the network design and cost recovery on the users of the network. Staff believes this more appropriately allocates the network costs to the cost-causer.

Id. Attach. C at 3. Notwithstanding the fact that the Missouri PSC agreed that SWBT's cost studies in Case No. TO-97-40 fully complied with TELRIC, see Final Missouri PSC Order at 33, the Staff (and, ultimately, the Missouri PSC itself) discounted by 50 percent the nonrecurring TELRIC-based costs submitted by SWBT. Costing and Pricing Report at 120-24; see B. Smith MO Aff. ¶ 32. The district court, in reviewing SWBT's challenge to this order, explained that "[t]he staff considered only competing TELRIC models, even though SWBT had argued that historical costs should be used to set rates. In the [First Arbitration Order], the PSC adopted its staff's recommendations." AT&T Communications, 86 F. Supp. 2d at 942; see Final Missouri PSC Order at 32-33.

In September 1997, AT&T filed a second petition for compulsory arbitration, alleging that certain issues about the pricing of additional UNEs remained unresolved. In October 1997, both AT&T and SWBT submitted a joint list of 160 unresolved issues, and the Missouri PSC ordered the parties to submit to mediation before a Special Master. The Special Master and the Missouri Staff conducted a lengthy mediation, after which the parties filed a Settlement Document identifying issues that had been resolved and issues that remained. The Special Master recommended a resolution for each of the remaining issues, and the Missouri PSC, in December 1997, issued a Report and Order largely accepting the Special Master's recommendations and setting rates on an interim basis. See Second Arbitration Order at 23-34.